

Prof. Kousser Responds to Prof. Bickerstaff's Comments  
Written by Prof. J. Morgan Kousser  
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Only the closest reasoning and the most detailed attention to the arguments and evidence of a massive, painstakingly documented, ambitiously revisionist history would justify the harsh rhetoric in Steve Bickerstaff's three-and-a-half-page attack on my Article[1]: "Very little" is new in my "retelling" of the passage and renewals of the Voting Rights Act, he asserts, and my "rehash" of Supreme Court decisions is even "less effective." My "unannounced agenda . . . slants the discussion and detracts from the credibility of [the Article's] scholarship." [2] I "unfairly denigrate[ ]" the "many complex and comprehensive" histories of Section 5, and my history lacks "thoroughness and objectivity." [3] But rather than responding to the specifics of my Article and argument, Bickerstaff offers only unsubstantiated assertions and confused and often incorrect capsule summaries of case law.

The terms "retelling" and "rehash" serve merely to disparage; they could be applied to eminent historians like Thucydides, Gibbon, or Woodward, as easily as to me. Bickerstaff never reveals my ominous "political agenda" or points out my disturbing "slants"—charges that are damning to me if true, but damning to him if not sustained, and even more damning if left too vague to be evaluated or even potentially countered. His disagreements with my analyses of particular judicial decisions are never spelled out; he just asserts a general contrary position and accuses me of bias for not agreeing with him. Instead of addressing my criticisms of specific cases, he treats those criticisms as condemnations of the lifetime corpuses of decisions and silent concurrences of particular justices. He reduces the force of his charge that my Article is not thorough by asserting that "a fair critical analysis of all of these cases in a single law-review article is impossible," [4] thus indicting me for failing to accomplish a task that he believes impossible to achieve. As the extensive references in my Article make clear, I draw on many interesting and useful papers and policy studies that analyze parts of that history, and I criticize others. My criticisms are directed at particular aspects of particular studies, which I identify. [5] Bickerstaff never specifically defends any of them, never examines any of them—indeed, he never even cites a single treatment of more than a tiny fragment of the history of Section 5, a curious oversight if "many complex and comprehensive" histories in fact exist. In fact, they do not, and Bickerstaff ignores general patterns that I point out in the history of Section 5, patterns that are the prime focus of my paper, as well the light that those patterns shed on individual events that have previously been examined in temporal and topical isolation.

In the only examples he proffers of what he asserts is my "unbalanced" [6] scholarship, Bickerstaff condemns my analysis of Supreme Court opinions by Justices Potter Stewart and Sandra Day O'Connor as flawed by "a particular political slant or agenda." [7] Lumping together opinions that they wrote or merely joined over decades, [8] Bickerstaff never considers their reasoning or the facts of individual cases, though he skewers me for failing to "look[ ] meaningfully at the reasoning given by the Justices for their opinions." [9] Repeatedly mischaracterizing my positions and never once examining my reasoning or the evidence I adduce

to support it, Bickerstaff also undermines his indictment by making factual errors and sweeping conclusions offered without any justification whatsoever.

I nowhere portrayed Justices Stewart and O'Connor "as foes of the Voting Rights Act"[10] per se even when, as in my discussions of *Beer* and *Bossier I*, I criticized their interpretations of the Act.[11] I never stated that Justice Stewart implied that Sections 2 and 5 of the Act were unconstitutional, only that he held in *Mobile v. Bolden*[12] that proof of discriminatory intent was required under the Constitution to show any violation of the Act.[13] I never charged that Justice Stewart "disregarded the text of Section 5 and sidestepped Supreme Court precedents" in *Bolden* or *City of Rome*, only that he did so in *Beer*, where he effectively inserted "retrogressive" before "effect" in reading the law and ignored explicit, contrary language in the Court's original reading of the VRA in *South Carolina v. Katzenbach*. [14] Far from explaining Justice Stewart's opinion in *Beer*, the Justice's silent joining of the majority opinion in *White v. Regester*, as I point out in my Article, was inconsistent with it, as his silent assent in *Allen v. State Board of Elections*[15] was inconsistent with his plurality opinion in *Bolden*. [16] And Bickerstaff errs in touting Justice Stewart as the source of the "elect" language favored by civil rights forces in the congressional consideration of the VRARA in 2006, because that phrase originated in minority voting rights in *White v. Regester*, a case that Bickerstaff condemns me for undervaluing, three years before *Beer*. [17]

When he turns to Justice O'Connor's jurisprudence, Bickerstaff charges that I believe that the Justice was a consistent "foe of minority political rights" and simply disagrees, concluding, without examining any opinions at all, that the voting rights majority of which O'Connor was usually a part from 1993 to 2000 only wanted to protect the VRA from being ruled unconstitutional, not to "hamper minority voting rights." [18] In fact, like Justice Stewart, Justice O'Connor was inconsistent. She concurred in Justice White's opinion in *Rogers v. Lodge*, [19] her first voting rights case, which effectively overturned Justice Stewart's plurality opinion in *Bolden*. She arguably upheld minority voting rights in her detailed and politically sensitive opinion in *Georgia v. Ashcroft*, [20] her last voting rights opinion. In between, she acted inconsistently, fulfilling her role as the swing justice on the Rehnquist Court. In particular, in my Article, I criticized O'Connor's opinions in *Shaw v. Reno* [21] and *Bossier I* in some detail, and I devoted much more attention to the aspects of *Shaw* that were not concerned with Section 5 in *Colorblind Injustice*, a book I cite repeatedly in the Article. [22] I am hardly alone in believing that *Shaw*, *Miller*, and the *Bossier* cases adversely affected minority voting rights. The ACLU, the Lawyers' Committee for Civil Rights Under Law, MALDEF, the NAACP-LDF, and other minority group organizations spent much time and money opposing them and their progeny, and Congress voted nearly unanimously for the "Bossier II fix" in 2006. Did the whole Congress, Republicans, as well as Democrats, share the same "political bias" as I do?

In my Article and in *Colorblind Injustice*, I present hundreds of pages of close and detailed readings of judicial opinions, of their consistencies and inconsistencies with each other and with the facts of each case, of their fulfillment of or deviation from the intentions of the framers of the Constitution and the VRA, of their interactions with administrative and legislative actions, and of

their consequences for the continuing struggle against discrimination. Bickerstaff skips over such pedestrian tasks and leaps immediately to conclusions, condemning me for some unspecified political bias because I do not share his interpretation, which he does not deign to justify. He leaves readers with the choice between diligent research and empty rhetoric.

[1]Robert S. Bickerstaff, *The History of Section 5 of the Voting Rights Act from Another Perspective*, 86 *Texas L.Rev.* See Also 38, 38–41 (2008), hereinafter *Another Perspective*. The other nine pages of Bickerstaff’s article, *id.* at 41–50, barely mention my Article, differ entirely in tone and content from the first three-and-a-half pages, and appear to be material from some other project inserted here for unknown reasons. I generally agree with these pages, as I do with Bickerstaff’s book *Lines in the Sand* (2007), except for his assertion in *Another Perspective*, at 45, that I do not give appropriate recognition to the case of *White v. Regester*, 412 U.S. 755 (1973) and its associated lower court cases, in one of which he worked. In my Article, I refer to *Regester* as one of “two major constitutional redistricting cases, both with opinions by Justice Byron White, that would shadow the interpretation of the VRA for the rest of the century,” I lay out in some detail the use of its “totality of the circumstances” test by Judge Spottswood Robinson in his opinion in the District Court of the District of Columbia in *Beer v. United States*, 364 F. Supp. 363 (D.D.C. 1974), and I suggest that Justice Potter Stewart would normally have been expected to follow *Regester* in his Supreme Court opinion in *Beer*. J. Morgan Kousser, *The Strange and Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 *Texas L. Rev.* 667, 691–93 (2008), hereinafter *Strange and Ironic*. In my book *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (1999), I mention *Regester* on 21 separate pages (7, 56, 58, 63, 65, 138, 281, 335–36, 340–42, 344–45, 375, 395, 428, 443, 453, 494, 497) and cite it as the key example in the field of voting rights of the pragmatic tradition in judicial actions, a tradition that I laud there and elsewhere. *Id.* at 7. Whatever my other failings, I have never been guilty of undervaluing *Regester*.

[2]Bickerstaff, *Another Perspective*, *supra* note 1, at 38.

[3]*Id.* at 38–39.

[4]*Id.* at 39. I also treat legislative and administrative actions, adding to the difficulty of my task.

[5]Kousser, *Strange and Ironic*, *supra* note 1. For examples of criticisms of particular studies, see the text and notes at notes 18–20, 22–25, 70. As if to detract from the comprehensiveness of my Article, Bickerstaff leaves off the time period (1965–2007) when he cites the title of the Article. Bickerstaff, *Another Perspective*, *supra* note 1, at 38.

[6]Bickerstaff, *Another Perspective*, *supra* note 1, at 38.

[7]*Id.* at 39.

[8]Bickerstaff, *id.* at 40, erroneously states that Justice Stewart wrote a dissent in *United States v. City of Rome*, 446 U.S. 156 (1980) and that O’Connor wrote opinions in *Miller v. Johnson*, 515 U.S. 900 (1995) and *Reno v. Bossier Parish (Bossier II)*, 528 U.S. 320 (2000). They joined opinions by others.

[9]*Id.* at 39.

[10]*Id.* at 39.

[11]Kousser, *Strange and Ironic*, *supra* note 1, at 693–96 (discussing Justice Stewart’s opinion in *Beer v. United States*, 425 U.S. 130 (1976)), 732–34 (discussing Justice O’Connor’s opinion in *Reno v. Bossier Parish*, 520 U.S. 471 (1997)).

[12]446 U.S. 55 (1980).

[13]Kousser, *Strange and Ironic*, supra note 1, at 699–700 (noting “Stewart’s substitution of an intent for an effect standard.”) Having testified about intent in the remand case of *Bolden v. City of Mobile*, 542 F.Supp. 1050 (S.D.Ala. 1982), as well as at the House Judiciary Subcommittee considering renewal of the Act in 1981, I am unlikely to mistake Justice Stewart’s ruling on the constitutionality of the Act.

[14]Id. at 695 (quoting the text of Section 5 and Chief Justice Warren’s opinion in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

[15]393 U.S. 544 (1969).

[16]Kousser, *Strange and Ironic*, supra note 1, at 693 (noting Justice Stewart’s failure to follow Judge Robinson’s lead in *Beer* by resting his holding on *Regester*), 699 (noting the inconsistency between *Bolden* and *Allen*).

[17]Bickerstaff, *Another Perspective*, supra note 1, at 40 (asserting that the “elect” language was “lifted from Stewart’s opinion in *Beer*”). *White v. Regester*, 412 U.S. 755, 766 (1973) (holding that the Constitution required equal opportunity to “participate in the political processes and to elect legislators of their choice”).

[18]Bickerstaff, *Another Perspective*, supra note 1, at 41. Bickerstaff seems to imply, that I believe that Justice O’Connor believed Section 5 and other parts of the VRA unconstitutional. None of the extensive discussions of Justice O’Connor’s opinion in my Article or in *Colorblind Injustice*, supra note 1, suggests any such thing.

[19]458 U.S. 613 (1982).

[20]539 U.S. 461 (2003).

[21]509 U.S. 630 (1993).

[22]*Colorblind Injustice*, supra note 1, especially at 377–96.